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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN WILSON KREISCHER,

Defendant and Appellant.

D067746

(Super. Ct. No. SCE342406)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz  
Lewis, Judge. Affirmed.

Dacia A. Burz, under appointment by the Court of Appeal for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Randall D. Einhorn, and  
Marilyn L. George Deputy Attorneys General for Plaintiff and Respondent.

John Wilson Kreischer was charged with six felonies related to the alleged assaults of two women, Judith R. and Janet H. After trial, a jury convicted Kreischer of attempted sexual battery of an unlawfully restrained person (Pen. Code, §§ 243.4, subd. (a), 664,<sup>1</sup> count 4) and simple assault (§ 240) as a lesser included offense to the charge of assault with intent to commit rape (§ 220, subd. (a)(1), count 2) related to the assault of Judith. The jury acquitted Kreischer of the other two charges related to Judith (assault during the commission of a residential burglary with intent to commit rape (§ 220, subd. (b), count 1) and residential burglary (§§ 459, 460 & 667.5, subd. (c)(21), count 3), as well as the two charges related to the alleged assault of Janet. After trial, Kreischer admitted that he had served a prior prison term and that he had five prior serious and violent felony strike convictions. At the sentencing hearing, the court denied Kreischer's motion to strike his prior strike convictions under *People v. Superior Court* (1996) 13 Cal.4th 497 (*Romero*) and sentenced Kreischer to 25 years to life in prison.

On appeal, Kreischer asserts several claims of error. First, he argues that the trial court committed reversible error by giving an incomplete jury instruction on the defense of mistaken belief of consent with respect to count 4. Kreischer next asserts that the court abused its discretion by admitting evidence concerning a prior sexual assault conviction. Third, Kreischer contends that the People failed to adequately plead that he could be sentenced as a third-strike offender in the event that he was convicted of only a

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

nonviolent or nonserious felony. Finally, Kreischer asserts that if his trial counsel forfeited any of these claimed errors, he received ineffective assistance of counsel. We reject each of these claims and affirm the judgment.

## FACTUAL BACKGROUND

### *A. The People's Evidence*

#### *1. Judith R.*

At the time of the events leading to Kreischer's arrest, Judith, who was 70 years old, had recently moved to the small town of Jacumba, east of San Diego. She lived alone in an apartment that had been converted from an art gallery, and that was located near a local market. There was an old sign above the front door of her home that read "Art Gallery." On the morning of the incident, Judith woke up early to prepare a stew to bring to her daughter, who had recently had a baby. At around 9:30 a.m., she walked to the nearby market to purchase some burgundy wine that she needed for the stew. Outside of the market, she said hello to an acquaintance, Dennis Ruth, who was standing in front of the store with two other men whom Judith did not know.

While Judith was talking with Ruth and the other men, Kreischer got out of his truck, which was parked nearby, and walked over to the group. Kreischer, whom Judith had never met, told Judith that she had a good figure and that she was "just what he was looking for." Judith ignored Kreischer's comments, and went into the market to purchase the wine. As she left the market, Kreischer made another comment to Judith about his truck. Judith ignored Kreischer and walked back to her apartment.

When Judith arrived home, she closed the front door without locking it and went into the kitchen to continue preparing the stew. She heard a noise coming from the living area and when she walked out of the kitchen, she saw Kreischer standing in her apartment. Without saying anything, Kreischer grabbed Judith and forced his tongue into her mouth. When Kreischer released Judith she said "yuck." She thought Kreischer seemed agitated. Kreischer then looked around the apartment and after spotting a sewing machine, asked Judith if she would make alterations to some of his jeans for him. Judith said that she was not interested, but also said that she would have to look at the jeans.

Judith continued working in the kitchen while Kreischer walked around the apartment. Judith testified that she repeatedly told Kreischer that she was busy and that he had to leave. Kreischer ignored Judith's requests, sat on Judith's bed, and told her that they would be good together. Kreischer told Judith that he wanted to be in her apartment all the time, and described how he would stroke her body. Judith testified that she was frightened and felt like a prisoner in her own home. She did not want to upset Kreischer, who was much larger than her and easily capable of overpowering her.

Kreischer eventually got up from Judith's bed and went into the kitchen. He approached Judith from behind and put his arms around her, squeezing her hard and trying to lift her off the ground. Judith was recovering from a recent hernia repair operation and told Kreischer that he was hurting her. Kreischer then put his hands under Judith's shirt and felt her breasts over her bra. He told Judith that she was ready for him and he was ready for her, and Judith could feel his erection on her back. Judith tried to push Kreischer away from her but he continued to grope her, putting his hands down

toward Judith's buttocks. Judith testified that she thought Kreischer held her for 10 to 15 minutes before she was able to get free.

Kreischer's phone rang and he took the call on speaker phone. Judith heard Kreischer's boss tell him that he had to be at a certain place at 11:00 a.m. Judith testified that Kreischer received two more incoming calls, and after the third call, he finally left her apartment. After Kreischer left, Judith tried to call 9-1-1 on her cell phone but could not get a signal. Instead, she called a friend, Tracy McPherson, who lived nearby. McPherson testified that when Judith called, she sounded shattered and distraught, and was crying. Judith told McPherson that a man had followed her home from the market and fondled her. McPherson immediately drove to Judith's apartment.

When McPherson arrived, Judith was still extremely upset. Judith told McPherson what had happened, and McPherson dialed 9-1-1 for her. The recording of the 9-1-1 call was played for the jury. Judith told the operator that Kreischer had followed her into her home and grabbed her and kissed her. She gave the operator Kreischer's first name and a brief physical description. Judith also told the operator that she had never seen Kreischer before and that he had driven away in a white pick-up truck with a camper shell, headed westbound on Old Highway 80. McPherson told the operator that Kreischer had left his sunglasses and reading glasses in Judith's apartment and that he had told Judith that he would be back.

Ruth also testified. He told the jury that after Judith stopped outside the market to say hello to Ruth and the other men, Kreischer appeared and took over the conversation. Ruth stated that when Judith left to go into the market to purchase the wine, Kreischer

followed her into the store. According to Ruth, Judith took the wine that she purchased to her apartment, returned with a photograph of her family to show Ruth and his companions and then left again. Ruth stated that after Judith left the second time, Kreischer told the men that he was going to move his truck. He parked his truck in front of Judith's apartment. Ruth also testified that Kreischer appeared anxious while Judith was present and that Judith was not giving Kreischer any special attention.

## *2. Janet H.*

During her testimony, Janet H. told the jurors that Kreischer entered her home without permission through her open back door. This incident occurred three days before Kreischer assaulted Judith. Janet also lived in Jacumba and often sat on her porch, where she would talk to friends and neighbors passing by. Janet met Kreischer several months before the incidents in this case and stated that he gave her a "bad vibe." The day before the incident, Kreischer called Janet and said that he wanted to visit her the next day. Janet told him that she was busy with another friend and did not want to see him.

That evening, Janet returned home with her friend and then she and the friend went to the bar at a well-known restaurant near Janet's house. While Janet and her friend sat at the bar, Kreischer walked in and out of the building three times, making eye contact with Janet each time but not saying anything to her. Janet eventually went home, locked her front door and went to her bedroom to watch television. When she heard a voice inside the house she walked to the kitchen where she discovered Kreischer standing in her living room. Janet told Kreischer to "get the fuck out" of her house. He responded "I knocked, I knocked" and then immediately left.

### *3. Prior Bad Act Evidence*

The prosecution also presented the testimony of the victims of two of Kreischer's prior sexual assault convictions, one that occurred in 1977 and the other in 1987. The victim of the first crime, Peggy S., testified that in 1977, when she was 24 years old, she lived in the same apartment complex as Kreischer. After a night of partying with his friends, Kreischer knocked on Peggy's door at around 11:00 p.m. When Peggy answered the door, Kreischer told her that he needed someone to talk to. Peggy felt sorry for him and let him into her apartment. Kreischer asked Peggy about her boyfriend and told Peggy that she should go out with him instead. Peggy told Kreischer that she was tired and wanted to go to bed, but Kreischer would not leave. When Peggy went into her kitchen, Kreischer grabbed Peggy and carried her into her bedroom. He held Peggy down on her bed and forcefully raped her. After inserting himself into her, Kreischer abruptly stopped, then left Peggy's apartment. Peggy immediately called a friend, who came over and they called the police.

The victim of the 1987 assault, Toni P., encountered Kreischer when she was 30 years old and hiking alone in Cuyamaca State Park. As she walked on a trail toward a dry riverbed, she began to feel uneasy and decided to head back to her car. As she walked back, she saw Kreischer across a field in the distance, walking in a direction to head her off. Toni kept walking, but Kreischer caught her and grabbed her from behind. Holding onto Toni, he led her toward the riverbed, threatening to hurt her as they walked. Toni tried to talk Kreischer out of hurting her by telling him that she had a heart condition. Once they stopped, Kreischer attempted to kiss Toni against her will several

times, at one point tripping her and holding her down. When the two heard voices in the distance, Kreischer decided to let Toni go and walked her to her car. As they walked, Toni touched his back and felt a knife that Kreischer then showed her. Near the end of the encounter, Kreischer told Toni that he wanted someone like her in his life and gave her his real name (he had given her a false name earlier) and phone number. Before driving away, Toni wrote down Kreischer's license plate number. Toni drove herself home and called her husband, who took her to the police station the following day.

After Peggy and Toni testified, the prosecutor read a stipulated statement that Kreischer had been convicted of forcible rape in connection with the events described by Peggy and that Kreischer had been convicted of kidnapping and simple assault in connection with the events described by Toni.

#### *B. Defense Evidence*

Kreischer took the stand in his own defense. He testified that on the day he met Judith, he was in Jacumba to pick up a refrigerator. He stopped at the market to talk to Ruth and the other men who were there. While he was talking to Ruth, Judith walked up and told the men that she was making stew for her daughter, who had just had a baby. Kreischer stated that he told Judith that he liked to cook and had made beef stew before. After Judith went into the market, she stopped and started to talk to Kreischer again. Kreischer asked her how old she was. After Judith told him her age, he commented that she was "doing pretty good for 70." According to Kreischer, he then said, "[i]f you need any help with your beef stew, let me know[,] I've got a lot of time to kill" to which Judith



responded, "okay." Kreischer testified that he asked Judith if he could call her and she said she would not mind and wrote down her phone number for him.

Kreischer then told Judith that he had to leave to go pick up the refrigerator. Kreischer testified that he drove to the nearby house where he was supposed to pick up the refrigerator, but returned to the market soon after because the owner was not home. He stated that when he returned to the group of men in front of the market, Judith had returned to show the men the photograph of her with her eight children. Kreischer repeated that he would "be happy to help [Judith with her] beef stew because [he had] time to kill." Judith responded, "okay." Kreischer then told Judith that he had to move his truck, which was blocking the front of the market. While Kreischer moved his truck, Judith started walking. Kreischer saw her enter what he thought was an arts and crafts store.

Because Kreischer thought that Judith had entered a business, he also went inside. Once inside, he at first saw only boxes, computers, and craft materials, but then noticed a bed and asked, "you live here?" When Judith responded in the affirmative, he apologized and Judith said "that's okay." Kreischer testified that the two then began to talk and Judith told him that her ex-husband had left her with eight children when he was 50, and that she had obtained a protection order against her ex-husband after he abused their daughter. According to Kreischer, Judith became emotional and he asked her whether she "would like to share a hug." She agreed and he hugged her. Kreischer then went into Judith's kitchen and helped her with the stew. Kreischer received a phone call from his boss, who told Kreischer to meet him at 11:45 a.m.

Kreischer said that after the call from his boss, he and Judith continued to talk. He helped her move a dresser and offered to fix things in her apartment. Kreischer also testified that Judith lifted her shirt to show Kreischer her scar from her hernia repair. Kreischer testified that at the end of the encounter, they walked out front and he offered to come back another time to help with repairs. Kreischer testified that he and Judith gave each other a goodbye kiss on the cheek. After he left, he tried to call Judith because he had left his sunglasses in her apartment, but he did not get a connection. When questioned as to whether there had been any other physical contact during his encounter with Judith, Kreischer stated that he remembered "hugging her at the stove, and it was from the side" but that he did not "know if [he] hugged her or not . . . ."2 Kreischer denied fondling Judith, trying to touch her breasts or buttocks, and forcibly kissing or grabbing her. He also testified that he could not get an erection because of a medical condition and that Judith never asked him to leave her apartment.

Kreischer's boss, Terrell Gore, testified that he called Kreischer on the morning in question, and that when he met with Kreischer later in the day, Kreischer told Gore that he had found a girlfriend, Judith, and was excited about his prospects with her.

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2 On cross-examination, Kreischer denied hugging Judith from behind, but when he was shown a transcript of his interview with one of the investigating detectives, he admitted that he did tell the detective that he hugged Judith from behind when she was in the kitchen.

## DISCUSSION

Kreischer raises three primary claims on appeal. He asserts: (1) That the trial court prejudicially erred by giving an incomplete *Mayberry*<sup>3</sup> instruction with respect to the charge of attempted sexual battery of an unlawfully restrained person; (2) that the court abused its discretion by admitting evidence concerning his conviction for the kidnapping and assault of Toni in 1987; and (3) that the third strike sentence he received was unauthorized because the People failed to adequately plead the possibility that he could receive a three-strike sentence even if he were convicted of only a non-serious or non-violent felony. Kreischer also contends that if this court determines that any of these issues have been forfeited, he was provided ineffective assistance of counsel.

### I

Kreischer contends that the trial court erred in instructing the jury on the defense of mistaken belief in consent with respect to the charge of attempted sexual battery because the court provided only a portion of the instruction. The People respond that Kreischer's trial counsel forfeited the issue by not objecting to the version of the instruction given. Further, even if the issue was not forfeited, any error was harmless because, given the state of the evidence, Kreischer was not entitled to a *Mayberry* instruction.

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<sup>3</sup> *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*).

A

During a discussion about jury instructions at trial, Kreischer's attorney requested that the court give a *Mayberry* instruction with respect to count 4, attempted sexual battery of a restrained person. Kreischer's attorney argued that if the instruction was warranted as to count 2, assault with intent to commit rape, then it was also appropriate as to count 4.<sup>4</sup> The court indicated its agreement, but then stated, without explanation, that as to count 4 it would provide only a portion of the *Mayberry* instruction set forth in the standard instruction, CALCRIM No. 935, for the crime of sexual battery by restraint.<sup>5</sup>

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<sup>4</sup> There is no other discussion in the record concerning whether the instruction was appropriate as to count 2, but it appears that the trial court had previously agreed to provide a *Mayberry* instruction as to counts 1 and 2.

<sup>5</sup> CALCRIM No. 935 provides in full: "The defendant is charged . . . with sexual battery [in violation of Penal Code section 243.4]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant [or an accomplice] unlawfully restrained [the victim]; [¶] 2. While [the victim] was restrained, the defendant touched an intimate part of [the victim]; [¶] 3. The touching was done against [the victim's] will; [¶] AND [¶] 4. The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. [¶] An intimate part is a female's breast or the anus, groin, sexual organ or buttocks of anyone. [¶] Contact must have been made with [the victim's] 's bare skin. This means that: [¶] 1. The defendant must have touched the bare skin of [the victim's] intimate part; [¶] OR [¶] 2. [The victim's] bare skin must have touched the defendant's . . . intimate part either directly or through (his/her) clothing. [¶] Someone is unlawfully restrained when his or her liberty is controlled by words, acts, or authority of another and the restraint is against his or her will. Unlawful restraint requires more than just the physical force necessary to accomplish the sexual touching. [A person does not unlawfully restrain someone if he or she only uses lawful authority for a lawful purpose.] [¶] [A touching is done against a person's will if that person does not consent to it. To consent, a person must act freely and voluntarily and know the nature of the touching.] [¶] [A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if: [¶] 1. He or she knew of the criminal purpose of the person who committed the crime; [¶]

The court instructed the jury that "[a] perpetrator is not guilty of Sexual Battery by Restraint if he actually and reasonably believed that the woman consented initially and actually and reasonably believed that she consented throughout the act." The court did not give the following two sentences contained in the standard instruction: "The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty." (CALCRIM No. 935.) Kreischer's trial counsel did not object to the court's failure to provide the full instruction. The court did provide the full instruction as to counts 1 (assault with intent to commit rape while committing first degree burglary) and 2 (assault with intent to commit rape).

## B

In *Mayberry*, *supra*, 15 Cal.3d 143, the Supreme Court held that a defendant who makes a reasonable and good faith mistake regarding a person's consent to sexual intercourse is not guilty of forcible rape. (*Id.* at p. 155.) The *Mayberry* court based its holding on the notion that a reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. (*Ibid.*) In other words, "[i]f a defendant entertains a reasonable and bona fide belief that a [victim] voluntarily consented to accompany him

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AND [¶] 2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).] [¶] <Defense: Reasonable Belief in Consent> [¶] [The defendant is not guilty of sexual battery if (he/she) actually and reasonably, even if mistakenly, believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]" (CALCRIM No. 935.)

and to engage in sexual intercourse, . . . he does not possess the wrongful intent that is a prerequisite . . . [for] rape by means of force or threat." (*Ibid.*)

In *People v. Williams* (1992) 4 Cal.4th 354 (*Williams*), the Supreme Court held that a trial court must instruct the jury concerning the reasonable mistake of fact defense discussed in *Mayberry* where "there is substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse." (*Williams, supra*, at p. 361.) Because a *Mayberry* instruction is premised on a mistake of fact, the *Williams* court held that "the instruction should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not."<sup>6</sup> (*Williams, supra*, at p. 362.)

The *Williams* court further explained that a *Mayberry* instruction is warranted "only when the defense is supported by 'substantial evidence,' that is, evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.' " (*Williams, supra*, 4 Cal.4th at p. 361.) The *Williams* court also reasoned that a trial court should not provide a *Mayberry* instruction where the victim and the defendant provide "wholly divergent accounts [of the alleged sexual encounter that] create no middle ground from which [the defendant] could argue he reasonably misinterpreted [the victim's] conduct. (See *People v. Burnett* [(1992)] 9 Cal.App.4th 685,

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<sup>6</sup> As noted, *Mayberry* and *Williams* concerned charges of forcible rape (§ 261, subd. (a)(2); *Mayberry, supra*, 15 Cal.3d at p. 155; *Williams, supra*, 4 Cal.4th at p. 359.) For purposes of this opinion we assume that the principles announced in *Mayberry* and *Williams* are equally applicable to the offense of attempted sexual battery of a restrained person. The People do not assert otherwise.

690 [if 'defense evidence is unequivocal consent and the prosecution's evidence is of non-consensual forcible sex, the [*Mayberry*] instruction should not be given']; *People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1369 [neither account of sexual encounter was evidence that defendant mistakenly believed victim consented even though she did not—'sexual act was [either] entirely consensual or the obvious product of force'].)" (*Williams, supra*, 4 Cal.4th at p. 362).)<sup>7</sup>

## C

In his opening brief, Kreischer asserts that the court prejudicially erred by giving an incomplete *Mayberry* instruction with respect to count 4. The Attorney General counters that Kreischer was not entitled to the instruction in the first instance because he failed to present sufficient evidence of equivocal conduct by Judith to support the

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<sup>7</sup> The *Williams* court also observed in dicta that, as in *Mayberry*, there may be cases "in which there is evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, but also evidence that this equivocal conduct occurred only after the defendant's exercise or threat of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' . . . No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior after the defendant had exercised or threatened 'force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another.' " (*Williams, supra*, 4 Cal.4th at p. 364.) However, because the "trier of fact is permitted to credit some portions of a witness's testimony, and not credit others" and "a trial judge cannot predict which evidence the jury will find credible" the court "must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred." (*Ibid.*) The *Williams* court directed that in such cases, the jury should be further instructed "that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' " (*Ibid.*)

instruction. Kreischer responds that there was sufficient evidence to warrant giving the instruction, arguing that "because jurors could have reasonabl[y] concluded that the evidence showed that both Judith [] and [Kreischer] were motivated to tell half truths," the "jurors could have reasonably believed each of their testimonies in part." We disagree. Although Kreischer's counsel requested the *Mayberry* instruction, Kreischer's defense was *not* that he held a mistaken belief that Judith had consented to sexual contact. Rather, Kreischer's testimony was that there had been *no* sexual contact, and that the physical contact that did occur, i.e., one or two hugs, and a kiss on the cheek, was explicitly consensual.

Kreischer testified that once he was inside Judith's home, he hugged her only after she said that it was okay to do so, that he may have hugged her again in the kitchen, and that they kissed each other on the cheek at the end of the encounter. He did not concede that any of the sexual conduct that supported the sexual battery charge—touching her breasts and her buttocks, sticking his tongue in her month, forcefully grabbing and holding her, and pressing his erection against her—occurred. Nor did Kreischer assert that he believed that Judith had consented to such sexual contact based on any equivocal conduct on her part. Rather, he expressly denied all of the sexual conduct charged. In view of Kreischer's denial, there was no basis for the trial court to instruct the jury on the defense of a good faith, reasonable mistake of fact concerning Judith's consent to the charged acts.

Kreischer argues that his testimony that Judith gave him her phone number, that she said "okay" when he invited himself to her apartment, and that she consented to his



hugging her and kissing her on the cheek at the end of their encounter was sufficient evidence of equivocal conduct on Judith's part to warrant a *Mayberry* instruction. He also points to his testimony that Judith told him details about her life, told him her zodiac sign and asked him to help her with household repairs, and his testimony that Judith permitted him to hug her after telling him about her abusive former husband.

Even if the jury believed Kreischer's testimony that Judith's conduct led Kreischer to believe that she consented to *a hug or two and a kiss on the cheek*, the testimony was not relevant to any mistake of fact defense to the acts *charged*. As discussed, because Kreischer did not admit the charged acts nor contend that Judith's conduct reasonably led him to believe that *those acts* were consensual, his testimony does not support his assertion on appeal that he was entitled to a *Mayberry* instruction.<sup>8</sup> In sum, because the instruction was not warranted in the first instance, the trial court's failure to give the full instruction did not constitute error.<sup>9</sup>

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<sup>8</sup> For this reason, Kreischer's reliance on *People v. Sojka* (2011) 196 Cal.App.4th 733 (*Sojka*) is also misplaced. Unlike here, in *Sojka* the failure to give the *Mayberry* instruction was error because the events leading up to the alleged attempted rape supported the defendant's theory that he mistakenly believed the victim consented to having sex with him. The defendant testified that he believed the victim was enjoying their *physical* foreplay, which the prosecution acknowledged had occurred, and that their subsequent sexual activity was mutual. (*Id.* at pp. 735-736.) Although the victim could not remember all of the events of the night because she was intoxicated, she admitted she was affectionate with the defendant when she met him that night at a bar and agreed to let the defendant give her a ride home. (*Id.* at p. 736.) Unlike the defendant in *Sojka*, who asserted the charged sex crime was consensual, Kreischer asserted that Judith's allegations of sexual battery were false.

<sup>9</sup> Because we conclude that the trial court's failure to give the full *Mayberry* instruction was not error since the evidence did not warrant the instruction, we do not reach Kreischer's claim that his trial counsel's failure to request the balance of the

## II

Kreischer next contends that the trial court abused its discretion under Evidence Code section 352 by allowing the prosecution to introduce evidence of the uncharged incident involving Toni under Evidence Code sections 1108 and 1101, subdivision (b). Alternatively, Kreischer asserts that the trial court should have sanitized the evidence by precluding Toni's testimony that Kreischer threatened her and that he showed her a knife.

### A

Before trial, the parties filed competing motions in limine concerning evidence of Kreischer's prior felony convictions. The prosecution sought to introduce evidence pertaining to four prior convictions under Evidence Code section 1108: the testimony of Peggy and Toni, and evidence concerning two additional convictions that involved separate 12-year-old victims. The prosecution argued that evidence concerning the four incidents was admissible under Evidence Code section 1108 because it showed Kreischer's "tendency to befriend, isolate, and take whatever he can get from women he barely knows." The prosecution also argued that the incidents were admissible under Evidence Code section 1101, subdivision (b), to show Kreischer's "intent, lack of mistake, common scheme and modus operandi."

Kreischer asserted that the earlier incidents were not sufficiently similar to the current offense to be admissible under Evidence Code section 1108. Kreischer also

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instruction constituted ineffective assistance of counsel. (See *People v. Wright* (1990) 52 Cal.3d 367, 404 ["It is established that reversal for ineffective assistance of counsel is generally unwarranted unless the defendant shows counsel's alleged failings prejudiced his defense'"].)

contended that even if the court deemed the evidence admissible under Evidence Code section 1108, the probative value of the evidence was substantially outweighed by its likelihood to unduly prejudice him. Kreischer noted that the prior events were too remote in time to be probative and that a jury had found him not to be a sexually violent predator after five years of treatment following his 1988 convictions related to his assaults of Toni and one of the 12-year-old victims.

After hearing the argument of counsel, the trial court ruled that evidence of the four uncharged incidents that the prosecution sought to introduce under Evidence Code section 1108 was highly relevant to, and probative of, Kreischer's sexual intent in the present case. The court stated that it found that the four "past uncharged events reflect [Kreischer's] tendency to engage lone females, develop some degree of familiarity or at least suggest friendship with these females, take it to another step where there's either a physical manifestation of a need for affection or verbal manifestation of that that type of need, sometimes reflected in touching or kissing, and then ultimately proceeding to sexual intercourse or at least an attempt as in Ton[i] P." The court concluded, however, that the proffered evidence concerning the two incidents involving 12-year-old victims, though highly probative of Kreischer's intent, was unduly prejudicial because of the age of the victims. The court excluded evidence of those crimes under Evidence Code section 352.

## B

"Subject to Evidence Code section 352, Evidence Code section 1108 permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a

defendant's propensity to commit offenses of the same type, and essentially allowing such evidence to be used in determining whether the defendant is guilty of the current sexual offense charge." (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1096.) " '[T]he willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.' " (*People v. Falsetta* (1999) 21 Cal.4th 903, 912 (*Falsetta*).)

Although there is a risk of unfairness inherent in all propensity evidence, the Legislature has determined that the need for uncharged sexual offense evidence is critical given the serious and secretive nature of sex crimes. (*Falsetta, supra*, 21 Cal.4th at p. 911.) Trial courts must determine whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, danger of undue prejudice, confusion of issues, or misleading the jury. (*Id.* at p. 917.) The weighing process is "entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

In evaluating propensity evidence under Evidence Code section 352, trial judges "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives." (*Falsetta, supra*, 21 Cal.4th at p. 917.) We will not find that a trial court abused its discretion in admitting other sexual acts evidence unless its ruling " 'falls outside the bounds of reason.' "

(*People v. Kipp* (1998) 18 Cal.4th 349, 371.) Similarly, we will disturb a trial court's ruling under Evidence Code section 352 only where the court has exercised its discretion in a manner that has resulted in a miscarriage of justice. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42.)

In addition, evidence of other uncharged acts may be admitted if such evidence tends to be relevant to an issue other than establishing defendant's propensity or disposition to commit the charged offenses. (Evid. Code, § 1101, subd. (b); *People v. Balcom* (1994) 7 Cal.4th 414, 424 [uncharged offenses can show "manifestations of a common design" or plan that defendant employed or developed in committing the charged offenses].)

## C

The trial court conducted a thorough balancing test before concluding that the evidence of the two uncharged acts would be admitted at trial. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 991 [evidence of defendant's prior acts was "extremely probative of appellant's sexual misconduct when left alone with young female relatives"].) As the trial court observed, the uncharged and charged acts shared strong similarities in method, including Kreischer isolating the victims (in Toni's case, in a remote area and in Judith's case, in her own home) so that they were more vulnerable to an assault, Kreischer attempting to befriend the victims, and his statements to the victims about his desire for physical affection.

Kreischer argues that Toni's testimony was " 'substantially more inflammatory' " than the evidence of the two charged incidents because it involved violent threats. Even

though the event involving Toni was more violent in nature than the evidence concerning Judith or Janet, it was not so highly inflammatory that the court's decision to allow it was outside the bounds of reason. Of note, Toni testified that Kreischer did not show her the knife while he threatened to hurt her and that he showed her the knife only after he had decided to let her go. Any prejudice that resulted from Toni's testimony was moderated by these facts. The prejudicial impact was also lessened by the fact that the jury was advised that Kreischer had been convicted of kidnapping and assault for the incident. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917 ["the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses"].) Even Kreischer's trial counsel noted that the jury's acquittal of Kreischer on the more serious charges showed that the jury did "a good job of compartmentalizing [the uncharged offense evidence] and finding [it] insignificant."<sup>10</sup>

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<sup>10</sup> Kreischer cites *People v. Harris* (1998) 60 Cal.App.4th 727 to support his assertion that Toni's testimony was unduly prejudicial. The prejudicial nature of the propensity evidence at issue in *Harris*, however, is far greater than that from the evidence at issue here. In *Harris*, the defendant was a nurse at a mental health hospital and was charged with sexually assaulting a former patient while she was in a disassociated state and another victim who had previously engaged in consensual sexual acts with the defendant, while the uncharged propensity evidence concerned a brutal, violent physical attack. As the *Harris* court stated, "at worst defendant licked and fondled an incapacitated woman and a former sexual partner, both of whom were thereafter on speaking terms with him. . . . On the other hand, the evidence of the [uncharged] incident described a viciously beaten and bloody victim who as far as the jury knew was a stranger to the defendant." (*Id.* at p. 738.)

On this record, we cannot conclude that the trial court abused its discretion by permitting Toni's testimony or by not sua sponte sanitizing the testimony in the manner Kreischer asserts on appeal.

### III

Kreischer's final contention is that the prosecution failed to adequately plead and prove the disqualifying circumstance that precluded Kreischer from receiving a presumptive two-strike term. Kreischer asserts that the charging document did not comport with the pleading requirements of the Three Strikes law or with due process because it failed to include a count-specific pleading of the factors that ultimately disqualified him from receiving a second-strike sentence.

#### A

The first page of the information filed by the prosecution indicated that Kreischer was being charged under "PC 667(b) thru (i) and PC1170.12 'THREE STRIKES LAW.'" After listing the charges in the current case, the document identifies one prison prior under sections 667.5, subdivision (b), and 668; three serious felony priors under sections 667, subdivision (a)(1), 668 and 1192.7, subdivision (c); and five strike prior convictions under sections 667, subdivisions (b) through (i), 1170.12, and 668. The information identifies each strike prior by its date, court and Penal Code section. None of the prior convictions, or their impact on sentencing, is directly tied to the specific criminal allegations of the present case.

During the preliminary hearing, the prosecution also introduced the records of Kreischer's five prior strike convictions, which he incurred in three cases in San Diego

County Superior Court: Kreischer's 1979 conviction for the rape of Peggy; Kreischer's 1982 conviction for assault with the intent to commit rape of 12-year-old Danielle H.; and Kreischer's 1988 conviction for the kidnapping of Toni and two counts of lewd conduct with 12-year-old Jodi M.

After the jury began its deliberations, the trial court inquired informally whether Kreischer would be requesting a jury trial with respect to the alleged prior convictions. Kreischer's trial counsel stated that he had not discussed the issue with his client. The court instructed the attorney to speak with Kreischer. After doing so, the attorney informed the court that Kreischer was willing to stipulate to the prior convictions. The trial court then advised Kreischer that he had a right to have the jury decide the prior conviction allegations, explaining that the prosecution would bear the burden of proving that the conviction allegations were true beyond a reasonable doubt. Kreischer stated that he understood, but confirmed that he would waive his right to a jury trial on those convictions if he were convicted of a felony by the jury.

The following day, the jury returned its verdicts, convicting Kreischer of only nonserious and nonviolent felonies. After the jury was discharged, Kreischer's counsel requested that the matter of prior convictions be continued to the following day so that he could review the impact of the priors on the conviction for felony attempted sexual battery by restraint. Kreischer's counsel stated that in light of the verdicts, he did not believe that the serious felony prior convictions were "still in play" but that he had to "figure out what's going on."



The following day, Kreischer admitted that he had served a prior prison term and that he failed to remain free of prison or conviction of another felony offense for a period of five years. Kreischer also admitted that the prior strike conviction for his 1979 conviction for the rape of Peggy was true and that he understood that the admission could double the prison term imposed in this case. The court then turned to Kreischer's 1982 conviction for assault with the intent to commit rape of a 12-year-old. The trial court asked Kreischer whether he understood that if he admitted that this second strike was true, it could result in a commitment to state prison for a period of 25 years to life. Kreischer responded, " I'm going to get 25 years or life for this?"

Kreischer then told the court that he understood the consequences, but his counsel argued that because the current convictions were not for serious or violent felonies, the maximum sentence that Kreischer faced was double the prison term imposed for the current conviction, not the third-strike penalty of 25 years to life. The prosecutor countered that Kreischer's prior convictions were super strikes and therefore, he was still eligible for third-strike sentencing. The trial court ordered a recess so that it, and the parties, could research the issue. After the recess, the court confirmed, and Kreischer's counsel agreed, that Kreischer *was* eligible to be sentenced to 25 years to life. The trial court then ordered another recess so that Kreischer's counsel could review the prior convictions to confirm that they were so-called "super strikes."

When the hearing resumed, the trial court confirmed that Kreischer's prior convictions under section 288 were "super strike[s] that would negate the operation of Prop 36." Kreischer's counsel then indicated that Kreischer was still prepared to admit

the truth of the prior convictions. Kreischer again stated his understanding that he faced a sentence of 25 years to life and admitted the truth of his prior convictions for assault with the intent to commit rape of a 12-year-old (§ 220, subd. (a)) and two counts of lewd conduct with a 12-year-old (§288, subd. (a)).

Prior to sentencing, Kreischer's counsel filed a statement in mitigation and asked the trial court to exercise its discretion under section 1385, subdivision (b), and *Romero* to strike Kreischer's prior strike convictions. Defense counsel argued that the prior strike convictions were extremely remote in time and that a sentence of two, three or four years would be more appropriate in this case. The prosecution filed a sentencing brief asserting that a sentence of 26-years-to-life, as recommended by the probation department, was appropriate punishment. At the sentencing hearing, after hearing argument from counsel and statements from Judith's daughter and Kreischer, the court concluded that Kreischer continued to pose a danger to society, declined to strike the prior strike convictions, and imposed a sentence of 25 years to life.

## B

"On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126 (hereafter the [Reform] Act). The [Reform] Act change[d] the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law a recidivist with two or more prior strikes who [was] convicted of any new felony [was] subject to an indeterminate life sentence. The [Reform] Act diluted the three strikes law by reserving

the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist [is] sentenced as a second strike offender. (§§ 667, 1170.12.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

Specifically, the amended law states that "[i]f a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced [as a second strike offender] unless the prosecution pleads and proves" one or more of several disqualifying factors. (§ 667, subd. (e)(2)(C); § 1170.12, subd. (c)(2)(C).) The disqualifying factors include the following factors applicable here: "(ii) The current offense is a felony sex offense, defined in subdivision (d) of section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290"<sup>11</sup> and "(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies: (I) A 'sexually violent offense' as defined in subdivision

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<sup>11</sup> Kreischer's conviction for attempted sexual battery of a restrained person requires registration pursuant to section 290. (See § 290, subds. (b) & (c) ["Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California . . . shall be required to register. . . . [¶] (c) The following persons shall be required to register: [¶] Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state . . . of a violation of. . . Section 243.4"].)

(b) of Section 6600 of the Welfare and Institutions Code.<sup>[12]</sup> [¶] . . . [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288." (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).)

"[D]ue process requires that an accused be advised of the specific charges against him so that he may adequately prepare his defense. [Citation.] An enhanced term cannot be imposed without proof of each fact it requires." (*People v. Hernandez* (1988) 46 Cal.3d 194, 208; see also *People v. Ford* (1964) 60 Cal.2d 772, 794 ["Before a defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction, or being armed with a deadly weapon] the fact of the prior conviction or that the defendant was thus armed must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived"].) Relatedly, section 969 states that "[i]n charging the fact of a previous conviction of felony . . . it is sufficient to state, '[t]hat the defendant, before the commission of the offense charged herein, was in (giving the title of the court in which the conviction was had) convicted of a felony . . . .' If more than one previous conviction is charged, the date of the judgment upon each conviction may be stated, and all known previous convictions, whether in this State or elsewhere, must be charged." (§ 969.)

## C

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<sup>12</sup> The crimes of rape (§ 261) and assault with the intent to commit rape (§220) are both defined as "sexually violent offenses" in Welfare and Institutions Code section 6600.

In support of his argument, Kreischer relies on *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), which addressed the imposition of a sentence under the One Strike law, not the Three Strikes law at issue here.<sup>13</sup> Kreischer asserts that, under the reasoning of *Mancebo*, the trial court's imposition of a third strike sentence was unauthorized because the information did not specify that his prior convictions disqualified him from treatment as a second-strike offender even if he were not convicted of a serious or violent felony.<sup>14</sup>

In *Mancebo*, the defendant was sentenced under the mandatory sentencing provision of the One Strike law "to two indeterminate 25-years-to-life terms for having committed forcible rape against one victim under the specified circumstances of gun use

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<sup>13</sup> The "One Strike" law, found in section 667.61, "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes perpetrated by force." (*Mancebo, supra*, 27 Cal.4th at p. 741.) The provision "applies if the defendant has previously been convicted of one of seven specified offenses, or if the current offense was committed under one or more specified circumstances. Subdivision (a) provides that if defendant has previously been convicted of an offense enumerated in subdivision (c), or if two of the circumstances specified in subdivision (e) apply to the current offenses, an indeterminate term of 25 years to life shall be imposed. Subdivision (b) provides that if one of the circumstances specified in subdivision (e) applies, an indeterminate term of 15 years to life shall be imposed. Subdivision (i) requires the facts of any specified circumstance to be pled and proved to the trier of fact or admitted by the defendant in open court. Subdivision (f) provides that if only the minimum number of qualifying circumstances required for One Strike sentencing treatment have been pled and proved, they must be used as the basis for imposing the One Strike term rather than to impose lesser enhancements or punishment under any other law." (*Id.* at pp. 741-42, emphasis added.)

<sup>14</sup> The Attorney General asserts that Kreischer forfeited this issue because he did not raise it below. Even if the claim was forfeited, however, we will exercise our discretion to address the issue on the merits to forestall Kreischer's further claim of ineffective assistance of counsel. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 621; *People v. Lewis* (1990) 50 Cal.3d 262, 282.)

and kidnapping, and forcible sodomy against the other victim under the specified circumstances of gun use and tying or binding." (*Mancebo, supra*, 27 Cal.4th at p. 738.) The jury also found that the defendant "personally used a gun in committing each offense" and the court imposed additional 10-year gun-use enhancements for each count under section 12022.5, subd. (a). (*Mancebo, supra*, at p. 738.)

On appeal, the defendant asserted that the imposition of the 10-year sentence enhancements for gun-use under section 12022.5, subdivision (a), violated the pleading and proof requirements of section 667.61 and his "due process right to fair notice because there was no notice that the People, for the first time at sentencing, would seek to invoke the multiple victim circumstance, to support One Strike sentencing so that gun use would become available as a basis for imposing additional section 12022.5, [subdivision] (a) enhancements." (*Mancebo, supra*, 27 Cal.4th at p. 739.) The Attorney General conceded its error in failing to allege the multiple victim circumstance enhancement for purposes of One Strike sentencing, but asserted that the error was harmless because the "the charging and conviction of crimes against both victims effectively alleged and established that circumstance." (*Ibid.*)

The Supreme Court rejected the People's argument, holding that the plain language of section 667.61, subdivision (i), required "all enumerated circumstances, including the multiple victim circumstance, to be specifically alleged in the information and proved before the People could invoke them in support of a One Strike sentence." (*Mancebo, supra*, 27 Cal.4th at pp. 740-741.) The court also based its holding on "subdivision (f) of section 667.61[, which] provides, in pertinent part, that 'If only the minimum number of

circumstances specified in subdivision (d) or (e) which are required for [One Strike sentencing] to apply have been *pled and proved*, that circumstance or those circumstances shall be used as the basis for imposing [the One Strike term] *rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty.*' (Italics added.)" (*Mancebo, supra*, at pp. 743-744.)

Because "[t]he record establishe[d] that only two circumstances enumerated in section 667.61, subdivision (e) were specifically alleged and proved with respect to each victim" and that "[n]either the original nor the amended information ever alleged a multiple victim circumstance under subdivision (e)(5)," the multiple victim circumstance could not be used as a basis to impose a One-Strike term. (*Mancebo, supra*, 27 Cal.4th at p. 743.) As a result, the Supreme Court affirmed the Court of Appeal's opinion striking the gun-use enhancement from the defendant's aggregate sentence. (*Id.* at p. 754.)

As noted above, and as Kreischer states, the Reform Act "as set forth in sections 667 and 1170.12, requires that when the current felony is not a serious or violent felony, the prosecutor must plead and prove . . . an enumerated disqualifying factor . . . to invoke the greater penalty of an indeterminate three strike term. (§§ 667, subd. (e)(2)(A), (C), 1172.12, subd. (c)(2)(C).)" Kreischer asserts that the information did not satisfy these provisions' pleading requirements because it did not make clear that he could face a sentence of 25 years to life even if he were *not* convicted of one of the serious or violent felonies that he was alleged to have committed.

The level of specificity in pleading that Kreischer asserts is required is not mandated by *Mancebo* or by the due process notification concerns that underlie that case.

*Mancebo* "involved the imposition of a statutory enhancement *that was not pleaded* in the charging document," and instead, could only be inferred from the final jury verdict. (*In re Varnell* (2003) 30 Cal.4th 1132, 1143, italics added.) Unlike the multiple victim enhancement concededly absent from the charging documents in that case, the information here specifically pleaded Kreischer's eligibility for punishment as a third-strike offender and set forth the super strike priors under "sections 667(b) through (i)" and "section 1170.12" that disqualified Kreischer from the relief provided by the Reform Act.<sup>15</sup>

We acknowledge that the information did not state specifically that, in the event Kreischer were convicted only of nonviolent or nonserious felonies, he would remain eligible for third strike sentencing. By pleading the super strike convictions (two under section 288, one under section 261, and one under section 220), however, the prosecution provided Kreischer with adequate notice that he was disqualified from the benefits of the Reform Act and that he faced an indeterminate sentence of 25 years to life under the Three Strikes law.

Further, even if the information was imprecise, Kreischer was not prejudiced. Kreischer was on notice from the outset of the case that if he were convicted of *any*

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<sup>15</sup> Additionally, an important aspect of the court's decision in *Mancebo* was the One Strike law's explicit requirement, set forth in subdivision (f), that the pleaded special circumstance be used to support the imposition of a one strike penalty, and not punishment authorized by any other provision (unless the other provision would result in a greater penalty). (§ 667.61, subd. (f).) Because of this requirement, *Mancebo* held that it was mandatory that the gun-use special circumstance be used to support the one-strike sentence, and not the gun-use sentence enhancement. No similar concern exists here.



felony, he would be facing a third-strike sentence.<sup>16</sup> Because the four prior super strike convictions were pleaded and proved, his only available option to avoid the imposition of a 25 years to life sentence was to request that the trial court strike the prior strike convictions under section 1385 and *Romero*. Defense counsel made that request both in advance of the sentencing hearing in a statement in mitigation and at the sentencing hearing. The trial court denied the request, specifically finding that Kreischer's background supported sentencing him as a third strike offender. In sum, Kreischer had notice of the potential sentence that he faced prior to making his decision to admit the truth of the prior strike allegations. The sentence imposed by the trial court was authorized and Kreischer was not prejudiced by his counsel's brief mistaken understanding that the jury's conviction of only a nonviolent, nonserious felony would preclude imposition of a third-strike sentence.

#### DISPOSITION

The judgment is affirmed.

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<sup>16</sup> Nor was Kreischer prejudiced by his counsel's incorrect statement after the jury rendered its verdict that Kreischer was ineligible for sentencing as a third strike offender. Once Kreischer's attorney was corrected, the attorney was provided with the opportunity to confirm that the prior convictions alleged in the information were within the enumerated disqualifying factors under section 667, subdivision (e)(2), and to consult with Kreischer about whether to admit the prior convictions before Kreischer did so.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.